

1 KEKER, VAN NEST & PETERS LLP
2 ROBERT A. VAN NEST - # 84065
3 rvannest@keker.com
4 SHARIF E. JACOB - # 257546
5 sjacob@keker.com
6 PAVEN MALHOTRA - # 258429
7 pmalhotra@keker.com
8 MICHELLE YBARRA - # 260697
9 mybarra@keker.com
10 THOMAS E. GORMAN - # 279409
11 tgorman@keker.com
12 DAVID J. ROSEN - #296139
13 drosen@keker.com
14 EDWARD A. BAYLEY - # 267532
15 ebayley@keker.com
16 KATIE LYNN JOYCE - # 308263
17 kjoyce@keker.com
18 LUIS G. HOYOS - # 313019
19 lhoyos@keker.com
20 633 Battery Street
21 San Francisco, CA 94111-1809
22 Telephone: 415 391 5400
23 Facsimile: 415 397 7188

13 Attorneys for Defendant
14 NETFLIX, INC.

15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION

18 BROADCOM CORPORATION, et al.,
19 Plaintiffs,
20 v.
21 NETFLIX, INC.,
22 Defendant.

23 Case No. 3:20-cv-04677-JD

24 **DEFENDANT NETFLIX, INC.'S
ADMINISTRATIVE MOTION TO
STRIKE UNTIMELY EXPERT
DISCOVERY MOTIONS**

25 Dept.: Courtroom 11, 19th Floor
26 Judge: Honorable James Donato

27 Date Filed: March 13, 2020

28 Trial Date: February 12, 2024

1 **I. INTRODUCTION**

2 On July 21, 2023, Plaintiffs Broadcom Corporation and Avago Technologies International
 3 Sales PTE. Limited (“Broadcom”) filed ten motions—eight motions ostensibly relating to expert
 4 opinions and two motions for summary judgment. Buried within these filings are ***four*** motions to
 5 strike portions of expert reports that Broadcom was required to file by July 7, 2023. These
 6 motions are untimely, and it would be prejudicial and fundamentally unfair to require Defendant
 7 Netflix, Inc. (“Netflix”) to respond to these motions on August 11, 2023 (the Court’s deadline for
 8 responsive *Daubert* briefs). It would also be a waste of the Court’s resources to decide these
 9 motions on full briefing. Accordingly, Netflix hereby moves the Court pursuant to Civil Local
 10 Rule 7-11 to strike Broadcom’s untimely motions.

11 **II. BACKGROUND**

12 On July 6, 2023, Netflix requested to meet and confer with Broadcom in advance of filing
 13 a motion to strike certain opinions of Broadcom’s technical expert Dr. Iain Richardson that had
 14 never been disclosed in Broadcom’s infringement contentions. Broadcom responded the
 15 following day and offered to “look at availability [to meet and confer] next week, although we
 16 ask whether it make sense to have a single conference at some point during the week of July 17 to
 17 address ***all of the motions to strike*** that ***both sides*** are contemplating.” Declaration Kristen E.
 18 Lovin in Support of Netflix’s Administrative Motion to Strike Untimely Expert Discovery
 19 Motions (“Lovin Decl.”), Ex. 1 (emphasis added). Netflix requested the meet and confer happen
 20 that day given the impending deadline imposed by Civil Local Rule 37-3. During the meet and
 21 confer later than morning, Broadcom noted a “deadline of July 21st for motions to strike.” Netflix
 22 quickly set the record straight: “The existing deadline to file motions to strike expert discovery is
 23 today.” Lovin Decl., Ex. 2 at 18:10, 20–21.

24 Netflix timely filed its Motion to Strike later that day.¹ Dkt. 432. Broadcom did nothing. It
 25 did not seek to meet and confer about its motions to strike, file any motions to strike, or seek
 26

27 ¹ Netflix filed its Motion to Strike as a noticed motion, consistent with practice of parties in this
 28 and in other cases have handled motions to strike expert opinions before this Court. Dkt. 381;
 Case No. 3:13-cv-02502, Dkt. 172.

1 leave for an extension under Federal Rule of Civil Procedure 6(b)(1)(B) to file its motion to strike
 2 out of time. And at no point thereafter did it ever reach out to confer about its planned motions to
 3 strike.

4 Instead, two weeks later on July 21, 2023, the parties filed, per the governing Scheduling
 5 Order, their motions for summary judgment and *Daubert* motions. More specifically, Broadcom
 6 filed **two** motions for summary judgment that, combined, totaled 40 total pages.² Quietly buried
 7 in the *Daubert* motions were four motions to strike expert opinions not disclosed in discovery
 8 responses. More specifically, Broadcom filed motions:

- 9 • To strike portions of Dr. Neumann’s expert report on invalidity “based on prior art or
 10 obviousness combinations that were not properly disclosed.” Dkt. 466-1 at 1:3-9, 1:16-
 2:16, 3:11-4:13, 4:15-6:5.³
- 11 • To strike portions of Dr. Orchard’s expert report on invalidity “based on prior art or
 12 obviousness combinations that were not properly disclosed.” Dkt. 466-1 at 1:3-9, 1:16-
 2:16, 3:11-4:13, 4:15-5:5, 6:6-10:2.
- 13 • To strike portions of Dr. Stamm’s expert report on damages because “Netflix did not
 14 disclose [that material] in its Responsive Damages Contentions.” Dkt. 469-1 at 1:8-16,
 2:23-3:18, 4:22-9:1.
- 15 • To strike portions of Dr. Lopez’s expert report on FRAND because he “present[ed] in his
 16 opening and rebuttal reports new damages theories that Netflix did not previously
 17 disclose.” Dkt. 473 at 2:7-19, 4:11-6:4, 7:1-10:7.

18 Broadcom understood its filings were, indeed, nothing more than motions to strike
 19 masquerading as *Daubert* motions. In fact, each of the above-listed motions includes a separate
 20 legal standards section addressing the standard for striking expert opinions for failure to disclose
 21 theories in invalidity or damages contentions (Dkt. 464-1 § III.B, Dkt. 469-1 § III.B, Dkt. 473
 22 § III.C) and also separates out its request to strike on these grounds in separate argument sections
 23 (Dkt. 464-1 § IV.A, Dkt. 469-1 § IV.A, Dkt. 473 § IV.B).

24 Oppositions to Broadcom’s *Daubert* motions and motions for summary judgment are due

25 ² Broadcom did so even though the Court has previously asked parties to consolidate summary
 judgement issues into a single 25-page motion. *See, e.g., Firstface Co., Ltd. v. Apple, Inc.*, No.
 26 3:18-cv-02245-JD, Dkt. 235 (N.D. Cal. Dec. 30, 2022) (“For Dkt. Nos. 222, 223, each side may
 27 file one summary judgment motion. Firstface’s motions are terminated without prejudice. It may
 28 file a single motion for summary judgment not to exceed 25 pages by January 6, 2023.”).

³ In addition, Broadcom attempts to strike Mr. Goodin’s expert report on the ground that it was
 not elected in Netflix’s election of prior art, incorporating by reference the Motion to Strike Dr.
 Neumann’s expert report. Dkt. 474-1 at 13.

1 on August 11, 2023.

2 **III. LEGAL STANDARD**

3 Civil Local Rule 37-3 states unequivocally that “no motions related to expert discovery
 4 may be filed more than 7 days after the expert discovery cut-off.” The Commentary to the Local
 5 Rules clarifies that “‘Discovery-related motions’ encompass *all* motions relating to discovery.”⁴
 6 A motion to strike expert discovery for inconsistencies with earlier served patent-discovery
 7 disclosures is, undoubtedly, “related to expert discovery.” The Commentary also notes that
 8 discovery-related motions include motions for discovery sanctions, and Broadcom requests expert
 9 opinions be stricken as a sanction in this case under Fed. R. Civ. P. 37(c).⁵ The current Local
 10 Rule is an expansion from the previous version of this Local Rule—which existed before
 11 November 10, 2022—and was expressly limited to “motions to compel expert discovery.”⁶ The
 12 expert discovery cut-off in this case was June 30, 2023. Dkt. 413. Accordingly, the deadline to
 13 file motions related to expert discovery was July 7, 2023, which Broadcom knew or should have
 14 known and which Netflix reiterated to Broadcom on the parties’ July 7, 2023 meet and confer.

15 “District courts have the inherent power to strike items from their docket for litigation
 16 conduct.” *Castro v. G.L.R. Construction*, 2016 WL 8730481 at *2 (N.D. Cal. 2016) (internal
 17 quotation marks and citation omitted) (striking untimely pleadings where “[p]laintiff did not
 18 convincingly explain why he could not comply with the deadline promulgated by the Local
 19 Rules”). *See also Wood v. Santa Barbara Chamber of Commerce*, 705 F.2d 1515, 1519 (9th Cir.
 20 1983) (district court did not abuse its discretion in striking untimely affidavits in summary

21
 22 ⁴ Emphasis added.

23 ⁵ *See, e.g.*, Broadcom’s *Daubert* motion against Netflix economics expert Dr. Mario Lopez
 24 (Dkt.473 at 5) (seeking relief under Fed. R. Civ. P. 37(c)(1)). *See* Broadcom’s *Daubert* motion
 25 against Netflix technical experts Dr. Michael Orchard and Dr. Clifford Neumann (Dkt. 466-1 at
 26 4) (seeking relief under Fed. R. Civ. P. 37(c)(1)). *See also* Fed. R. Civ. P. 37(c)(1) (describing as
 27 a “sanction” the exclusion of information that was not disclosed pursuant to Rule 26).

28 ⁶ In full, the prior version of this provision read: “Where the Court has set separate deadlines for
 29 fact and expert discovery, no motions to compel fact discovery may be filed more than 7 days
 30 after the fact discovery cut-off, and no motions to compel expert discovery may be filed more
 31 than 7 days after the expert discovery cut-off.” Web Archive dated October 6, 2022, available at
<https://web.archive.org/web/20221006162957/https://www.cand.uscourts.gov/rules/civil-local-rules/>.

1 judgment opposition where party failed to request extension of time or show excusable neglect).

2 Accordingly, the failure to comply with Civil L.R. 37-3 is grounds for denying a motion
 3 to strike a party's expert report. *See, e.g., AllRounds, Inc. v. EShares, Inc.*, No. 20-cv-07083-VC-
 4 DMR, Dkt. 267 (N.D. Cal. July 25, 2022) (denying as untimely a motion to strike portions of an
 5 expert report because "Civil Local Rule 37-3 requires that any discovery motion be filed no more
 6 than seven days after the discovery cut-off").

7 If a party has missed a court deadline, such as one set by Civil L.R. 37-3, the proper
 8 remedy is to acknowledge the missed deadline and seek leave of court. Federal Rule of Civil
 9 Procedure 6(b)(1)(B) provides: "When an act may or must be done within a specified time, the
 10 court may, for good cause, extend the time ... on motion made after the time has expired if the
 11 party failed to act because of excusable neglect." It is improper for Broadcom to take what it
 12 knows to be an untimely motion to strike and couch it in terms of a *Daubert* motion in order to
 13 avoid the missed deadline.

14 **IV. ARGUMENT**

15 Broadcom's buried motions to strike should be stricken. Broadcom's own briefing makes
 16 clear that these are expert discovery motions subject to Civil Local Rule 37-3—each of the above-
 17 listed motions includes a separate legal standards section on striking reports for failure to disclose
 18 theories in invalidity or damages contentions (Dkt. 464-1 § III.B, Dkt. 469-1 § III.B, Dkt. 473 §
 19 III.C) and also separates out its request to strike on these grounds in separate argument sections
 20 (Dkt. 464-1 § IV.A, Dkt. 469-1 § IV.A, Dkt. 473 § IV.B). Since they are motions to strike expert
 21 reports based on alleged discovery failures (i.e., disclosing new theories for the first time in
 22 expert reports), they are "motions related to expert discovery" under Civil Local Rule 37-3. *See*
 23 *AllRounds*, No. 20-cv-07083-VC-DMR, Dkt. 267 (applying Rule 37-3 to motions to strike expert
 24 reports); Civil L.R. 37-3 Commentary ("Discovery-related motions' ... include[es] ... motions
 25 for discovery sanctions"). Thus, they were due on July 7, not July 21.

26 The parties' own prior conduct confirms that expert discovery motions under Civil Local
 27 Rule 37-3 should be treated differently, and filed according to different deadlines, than *Daubert*
 28 motions. In their Joint Stipulation re: the Deposition of Dr. Michael Goodrich (Dkt. 431), which

1 Broadcom signed, the parties agreed these were separate motions with separate deadlines.

2 Broadcom's late filing on July 21 must have consequences. After Broadcom decided not
 3 to timely file by the July 7 deadline, it should have sought leave from this Court to file its motions
 4 after the deadline. *See* Fed. R. Civ. P. 6(b)(1)(B). But Broadcom opted not to use this procedure,
 5 hoping it could just elide the missed deadline. This disregard for the Local Rules should not be
 6 tolerated. *Compare, e.g., Segan LLC v. Zynga Inc.*, No. 14-cv-01315-VC (JCS), Dkt. 125 (N.D.
 7 Cal. January 14, 2015) ("Segan violated Local Rule 37-3 by filing the Motion more than seven
 8 (7) days after the close of discovery, and never even sought an extension of this deadline. There is
 9 no excuse for this conduct, and it had consequences."). Indeed, this Court has denied motions on
 10 other occasions as untimely. *See, e.g.,* Case No. 3:13-cv-05076-JD, Dkt. 37 (denying motion to
 11 modify case management deadlines as untimely). Accordingly, the Court should exercise its
 12 "inherent power to strike items from [its] docket for litigation conduct" and strike these untimely
 13 motions. *Castro*, 2016 WL 8730481 at *2.

14 **V. CONCLUSION**

15 For the foregoing reasons, the Court should strike Broadcom's untimely expert discovery
 16 motions, which appear in the following docket entries⁷ at the following pages and lines:

- 17 • Dkt. 468 (public) / Dkt. 466-1 (sealed) (re: Drs. Neumann and Orchard) at 1:3–9, 1:16–
 18 2:16, 3:11–4:13, 4:15–10:2
- 19 • Dkt. 471 (public) / Dkt. 469-1 (sealed) (re: Dr. Stamm) at 1:8–16, 2:23–3:18, 4:22–9:1
- 20 • Dkt. 473 (public) (re: Dr. Lopez) at 2:7–19, 4:11–6:4, 7:1–10:7
- 21 • Dkt. 475 (public) / Dkt. 474-1 (sealed) (re: Mr. Goodin) at 13:3–19

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 27 ⁷ For the Court's convenience, Netflix includes docket entry numbers for both the public and
 28 sealed versions of the motions at issue. The Lopez motion was not filed under seal.

1 Dated: August 4, 2023

KEKER, VAN NEST & PETERS LLP

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3 By: /s/ Sharif E. Jacob

4 ROBERT A. VAN NEST
5 SHARIF E. JACOB
6 PAVEN MALHOTRA
7 MICHELLE YBARRA
THOMAS E. GORMAN
DAVID J. ROSEN
EDWARD A. BAYLEY
KATIE LYNN JOYCE
LUIS G. HOYOS

8
9 Attorneys for Defendant
10 NETFLIX, INC.

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